

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES OF AMERICA)	
)	DOCKET NO.: 3:18-CR-342
v.)	
)	
DAVID N. RUSSELL)	
Defendant,)	
)	

UNITED STATES' MEMORANDUM IN SUPPORT OF SENTENCING POSITION

The United States of America, by and through R. Andrew Murray, United States Attorney for the Western District of North Carolina, and undersigned counsel and in accord with 18 U.S.C. § 3553(a) and the U.S. Sentencing Commission Guidelines Manual ("Guidelines"), hereby provides its position with respect to sentencing for defendant David Russell ("Russell" or "defendant"). The United States requests that this Court adopt the findings of the Pre-Sentence Investigation Report ("PSR"), which indicates that the appropriate Guidelines range is 18-24 months. Based on that range, the § 3553(a) factors, and the reasons stated in a separately filed motion, a meaningful period of incarceration of 15 months is necessary to capture the seriousness of the defendant's conduct and the need for general deterrence in cases, like this one, that are the product of choices to cheat for financial gain over an extended period of time. A term of supervised release and restitution of \$290,487, as agreed upon by the parties, is also warranted.

I. Factual Background

Russell, a 66-year-old North Carolina resident, obtained degrees in Psychology and Zoology from the University of North Carolina at Chapel Hill. Russell later attended UNC Chapel Hill School of Medicine and earned a Doctor of Medicine. In 1984, Russell completed a

Pre-Residency Fellowship Program at Tufts New England Medical Center. Since 1987, Russell has been employed as a medical doctor at various medical practices, including some in the following locations: Salisbury, North Carolina; Charlotte, North Carolina; and Macon, Georgia.

The criminal conviction in this case stems from Russell's attempt to evade paying his past due federal income taxes, interest, and penalties.¹ Russell failed to pay significant taxes for tax years 2005-2008, 2010, and 2011. The Internal Revenue Service ("IRS") sent him notices that detailed the amounts of the past-due taxes, interest and penalties. In October 2012, an IRS collections officer issued Russell a summons for his testimony and various financial records related to a resolution of these past due taxes. After the IRS accommodated Russell's request to reschedule the meeting, Russell failed to show up. After failing to show up a second time, the United States filed a petition to enforce the IRS summons in federal court. District Judge Catherine Eagles of the Middle District of North Carolina adopted Magistrate Judge Joe Webster's Report and Recommendation that the petition be granted. The court ordered Russell to appear before the IRS collections officer, answer questions, and provide financial records. Russell appeared, but he refused to answer all but basic questions and he provided woefully inadequate financial records. The United States moved for an order to show cause why Russell should not be held in contempt for failing to comply. The court issued such an order, but Russell never had to answer the order because he could not be found for service.

¹Before attempting to evade the payment of his past-due taxes for tax years 2005-2008 and 2010-2011, Russell had problems timely paying even earlier taxes. Russell owed substantial taxes for his 1999, 2000, and 2004 tax years and the IRS had to seek involuntary collection of these amounts as well. Russell then filed a lawsuit against the government in the Court of Federal Claims, making various frivolous and tax-defier arguments, such as claiming that the United States unjustly enriched its coffers through the levy proceeds and claiming that the government's employees were acting as financial terrorists. Russell then filed a frivolous 2005 tax return that the IRS did not accept. Russell claimed to have filed the return under duress and further claimed that he owed no taxes on his wages because he was restoring the value of his "labor property" that was protected by the Fifth Amendment of the Constitution.

Russell's criminal conduct was not limited to failing to comply with the summons. Shortly after Judge Webster issued his Report and Recommendation, Russell opened an account with a bank in the form of a reloadable debit card. Russell would use this card to deposit money, including money from paychecks, in an attempt to hide these assets from the IRS. Russell also instructed one of his employers to pay him by check instead of by direct deposit and he directed that check be paid in the name of a business entity instead of Russell in his individual capacity. The intent and effect of these requests was to hide income and assets from the IRS. When the employer informed Russell that he had to receive pay via direct deposit, Russell continued to insist on the payments being made to a business entity that he controlled instead of to him in his individual capacity.

On or about June 2, 2016, Russell agreed to a voluntary interview with IRS Criminal Investigations Special Agents. During this interview, Russell admitted to using a business bank account to pay for personal expenses as well as to deposit personal paychecks from another job. Sometime after this meeting with IRS special agents, Russell, through counsel, reached out to the U.S. Attorney's Office to discuss the possibility of resolving his criminal conduct. The parties reached an agreement and the government filed the plea agreement and factual basis with this Court. Subsequently, Russell entered a guilty plea on November 9, 2018.

II. Guidelines Calculation

As the Court is well aware, although the Guidelines are advisory, sentencing courts "must consult those Guidelines and take them into account when sentencing." *United States v. Booker*, 543 U.S. 220, 261 (2005). Thus, at sentencing a court "must first calculate the Guidelines range." *Nelson v. United States*, 555 U.S. 350, 351 (2009). Here, the United States agrees that the appropriate Guidelines range with respect to incarceration is 18-24 months. That includes a base

offense level of 15 based on a tax loss of over \$250,000 and less than or equal to \$550,000, and a 3-level reduction for the defendant's acceptance of responsibility and timely notification to the United States of his intention to plead guilty.² The United States asks this Court to adopt the PSR's findings and advisory Guidelines range.

III. Section 3553(a) Factors

As the Court is also well aware, after calculating the Guidelines, a sentencing court must then consider that Guidelines range, as well as the sentencing factors set forth in § 3553(a), and determine a sentence that is appropriate and reasonable for the individual defendant. *Nelson*, 555 U.S. at 351; *see also United States v. Hughes*, 401 F.3d 540, 546 (4th Cir. 2005). With respect to § 3553(a)'s enumerated factors, relevant here are the "nature and circumstances of the offense" and the need for the sentence "to reflect the seriousness of the offense," and "the history and characteristics of the defendant." § 3553(a)(1), (a)(2)(A). Moreover, of particular importance is the need for the sentence "to afford adequate deterrence to criminal conduct." § 3553 (a)(2)(B). As explained below and in a separately filed motion, based on those factors, a sentence of 15 months' imprisonment is reasonable in this case.

A. Nature, Circumstances, and Seriousness of the Offense

The fraud in this case was serious and warrants a sentence of 15 months in prison. Critically, Russell's criminal conduct was not limited to an isolated event. To the contrary, the conduct spanned multiple years with plenty of opportunities to cease his criminal behavior. In the face of active collection efforts by the IRS, including a court order to comply with a summons, Russell chose time and again to double-down and continue the fraud.

² As noted here, the PSR includes a three-level decrease for acceptance of responsibility. In this respect, the United States agrees that the defendant qualifies, pursuant to U.S.S.G. § 3E1.1(a), for a two-level reduction. In addition, the defendant timely notified the United States of his intention to plead guilty, thus permitting the United States to avoid preparing for trial and to allocate its resources more efficiently. Accordingly, the United States hereby moves, pursuant to § 3E1.1(b), to decrease the defendant's offense level by one additional level.

Russell failed to pay substantial taxes for six years and then tried to evade the IRS's efforts to collect these taxes. Importantly, the amounts have never been contested. So, Russell did not dispute that he owed the amounts, failed to pay them, and then attempted to prevent their collection. After receiving a hand-delivered IRS summons for records, Russell chose to evade payment of his taxes instead of trying to resolve his tax problems in an amicable way.

The judicial system's earlier involvement in this dispute did not discourage Russell from continuing his evasive conduct. Russell opened an account for a reloadable debit card, which he used to hide assets from the IRS, shortly *after* the magistrate judge issued a Report and Recommendation that the petition to enforce the IRS summons be granted. Shortly thereafter, Russell met with the IRS under the court's compulsion, but he nonetheless failed to abide by the court's order because he refused to answer nearly all questions and provided a pittance of financial documents. The court later issued an order to show cause why Russell should not be held in contempt for failing to comply. Russell never had to show this cause because he could not be found. Never having to answer for his failure to comply, Russell continued his evasive conduct, including through the issuance of paychecks in the name of his business entity to hide his personal income.

A large component of this country's tax system is voluntary reporting and payment. For such a system to work, it depends on an inherent trust with taxpayers. Russell violated this trust when he initially failed to pay his taxes, and he exacerbated the violation over and over by hampering IRS efforts to collect his taxes. So, not only did Russell violate the trust that is central to our system of taxation, but he also attempted to sabotage the counter-measures that are in place to address violations of that trust. The integrity of the tax system is crucial to the operations of various levels of government, and abuses of the tax system shake the public's trust

in it. In short, tax crimes harm more than a single victim. Rather, they harm all taxpaying citizens.

B. The Defendant's Personal History and Characteristics

The sentence imposed by the Court here must also take into account Russell's sophistication, as well as his acceptance of responsibility. Russell's history and characteristics reveal a level of sophistication and competence of a defendant who knew the consequences of his actions. Russell is a very educated man who has worked as a medical doctor for many years. Russell also opened and runs his own clinic. He knew enough to establish his own company and use it to pay some of his personal expenses. He understood the magnitude of the decision to engage in the fraud. The seriousness of the offense was certainly not lost on him, otherwise, he would not have taken multiple steps to conceal his assets from IRS collectors. The government also notes, however, that Russell quickly admitted to his conduct to government investigators and has accepted responsibility for his actions. Nonetheless, nothing in the PSR mitigates Russell's culpability or responsibility in this case.

The PSR details Russell's current venture in operating a medical clinic geared towards helping people addicted to painkillers. (PSR ¶ 44). This may be a worthy practice, but it does not justify avoidance of an active term of imprisonment. Russell has expressed regret that his patients may have to go without his care for a period of time. (PSR ¶ 44). This would be regrettable, but one fact remains clear: Russell put himself in this position and has no one else to blame. In fact, this same medical practice is the one that he used to facilitate his tax fraud (or at least it is the same business name). (Compare PSR ¶ 76 with PSR ¶ 36). There are often regrettable collateral consequences to any criminal sentence, such as a family losing its breadwinner or a company having to close after its primary investor goes to prison. Despite these

consequences, defendants need to be held accountable. The greater the collateral consequences, the worse the decision to engage in criminal behavior becomes. Russell knew that he had people who depended on him when he continued to engage in this conduct, and he alone is responsible.

C. General Deterrence

The nature of the federal system of taxation and the nature of tax crimes reveal how important general deterrence is to consider in cases like this one. Indeed, the Sentencing Commission made a point of discussing the importance of general deterrence to tax crimes. *See* U.S.S.G. § 2T, introductory comment (“Because of the limited number of criminal tax prosecutions relative to the estimated incidence of such violations, deterring others from violating the tax laws is a primary consideration underlying these guidelines”). The Fourth Circuit endorsed that reasoning in a tax evasion case, where it vacated a sentence of 18 months’ home confinement:

Given the nature and number of tax evasion offenses as compared to the relatively infrequent prosecution of those offenses, we believe that the Commission’s focus on incarceration as a means of third-party deterrence is wise. The vast majority of such crimes go unpunished, if not undetected. Without a real possibility of imprisonment, there would be little incentive for a wavering would-be evader to choose the straight-and-narrow over the wayward path.

United States v. Engle, 592 F.3d 495, 502 (4th Cir. 2010).

The taxation system is a largely voluntary one, meaning that taxpayers rely on individuals to comply with their tax obligations. Criminal enforcement and strict penalties for violations are critical to protecting this system. *See, e.g., United States v. Ture*, 450 F.3d 352, 357 (8th Cir. 2006) (“The criminal tax laws are designed to protect the public interest in preserving the integrity of the nation’s tax system”). The IRS’s most recent study of tax compliance estimates that only 83.1% of individuals are compliant, leaving a yearly tax gap of over \$458 billion

dollars in uncollected taxes. *See* “Tax Gap Estimates for Tax Years 2008-2010”, April 2016.³ This voluntary system of compliance would be undermined by light sentences because it would cause would-be tax fraudsters to believe that they too will face light consequences. “Studies have shown that salient examples of tax-enforcement actions against specific taxpayers, especially those that involve criminal sanctions, have a significant and positive deterrent effect.” Joshua D. Blank, *In Defense of Individual Tax Privacy*, 61 *Emory L.J.* 265, 321 (2011). These studies and statistics show the impact that non-compliance with the tax laws has on the country and the deterrent effect of meaningful sentences.

Uncovering violations of this system can often involve significant time and resources, thereby further magnifying the harm caused. In other words, the tax gap noted above does not include any consideration for the cost of investigating non-compliance with the tax laws. That additional waste of resources is particularly relevant to Russell’s conduct, as his defiance of a duly-issued IRS summons resulted in the government having to seek judicial enforcement, thus placing an additional burden on the federal court system. Russell took proactive steps to try and prevent the IRS from determining the collectability of his past due taxes, which is certainly worse than inaction on Russell’s part. It is therefore critical for Russell’s sentence to show that there are real and significant consequences to this kind of behavior.

IV. Conclusion

For the reasons stated above and the United States’ separately filed motion, a sentence of 15 months’ imprisonment and restitution of \$290,487 provide a sentence in this case that is reasonable but not greater than necessary to achieve the goals of sentencing.

³ Available online at:
<https://www.irs.gov/pub/newsroom/tax%20gap%20estimates%20for%202008%20through%202010.pdf>

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